

Eric B. Eisinger, WSBA #34293  
Bret Uhrich, WSBA #45595  
Walker Heye Meehan & Eisinger, PLLC  
1333 Columbia Park Trail, Ste 220  
Richland, WA 99352  
Telephone: (509) 735-4444  
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

R.W., individually and on behalf of his  
marital community,

Plaintiff,

v.

COLUMBIA BASIN COLLEGE, a  
public institution of higher education,  
RALPH REAGAN, in his official and  
individual capacities, LEE THORNTON,  
in his official and individual capacities.

Defendants.

Cause No. 4:18-cv-05089-RMP

PLAINTIFF'S MEMORANDUM IN  
OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT

Thomas S. Foley United States  
Courthouse  
920 W. Riverside Ave, Room 840  
Spokane, WA 99201

1           Nowhere in Defendants' 29-page, 6,451-word memorandum will the Court  
2 find the words "Abusive Conduct." R.W. was trespassed and sanctioned by  
3 Columbia Basin College ("CBC") not because he posed an imminent risk of harm  
4 to himself or others, but because he purportedly engaged in "Abusive Conduct."  
5 This is apparent from the very first letter sent by CBC on March 7, 2017:

7           According to the Student Code of Conduct:

8           *Any student will be subject to disciplinary action who, either as a principal or participator or by*  
9           *aiding or abetting, commits or attempts to commit any of the following which are hereby*  
10           *prohibited:*

11           **WAC 132S-100-205, Abusive conduct.**

12           Physical and/or verbal abuse, threats, intimidation, harassment, online harassment, coercion,  
13           bullying, cyberbullying, retaliation, stalking, cyberstalking, and/or other conduct which threatens  
14           or endangers the health or safety of any person or which has the purpose or effect of creating a  
15           hostile or intimidating environment.

16           It is the College's responsibility to provide a safe and secure environment in which individuals may learn  
17           and work; it is our expectation that students will conduct themselves in a responsible manner and  
18           respect the rights, privileges, and property of other members of the academic community including  
19           students and CBC employees. Based upon the information I have received thus far, it is reasonable that  
20           you be trespassed from both the Richland and Pasco CBC campuses, pending an investigation.

21 From the March 7, 2017 interim sanction letter to the June 12, 2017 final  
22 affirmance of misconduct and imposition of sanctions by President Lee Thornton,  
23 the basis for CBC's actions were that R.W. engaged in "Abusive Conduct" -- the  
24 "Abusive Conduct" of having concerning thoughts and disclosing those thoughts  
25 solely to his medical providers in seeking treatment.

          In attempting to construct a narrative of justification, CBC cites to discrete  
comments and notations by R.W.'s medical providers which were interspersed  
among voluminous records from those same providers indicating that R.W. was

1 not a threat to others. CBC did not have these records when it first took action  
2 against R.W., nor did CBC ever obtain medical or other objective evidence that  
3 R.W. was a threat to anyone.  
4

5 In 1972, the Supreme Court in *Healy v. James* announced that the First  
6 Amendment applies with equal force on college campuses as it does in the  
7 community at large. CBC, Ralph Reagan and Lee Thornton have not identified  
8 any exception to the First Amendment which would allow CBC to sanction R.W.  
9 for the “Abusive Conduct” of seeking help from his medical provider. Further,  
10 both Reagan and Thornton acknowledged that R.W. did not pose a direct threat to  
11 others, and yet still imposed sanctions against him as a disabled individual. As a  
12 result, the Court should deny the Defendants’ motion for summary judgment and  
13 grant R.W.’s motion for summary judgment establishing liability on all claims.  
14  
15

## 16 I. FACTS

### 17 Background Facts.

18  
19 In February of 2017, R.W. was experiencing substantial stress after returning  
20 to the nursing program at CBC. *Eisinger Decl. at Exhibit AH, ECF No. 37-34, pgs.*  
21 *5-6; Eisinger Decl. at Exhibit D, ECF No. 37-4, pg. 4.* This included an inability  
22 to sleep and an increase in seizure activity arising from R.W.’s epilepsy. *Eisinger*  
23 *Decl. at Exhibit X, ECF No. 37-24, pg. 5; Eisinger Decl. at Exhibit L, ECF No. 37-*  
24 *12, pg. 1.* During his enrollment, R.W. was a disabled person suffering from  
25

1 chronic back pain, epilepsy, insomnia, anxiety and depression. *Eisinger Decl. at*  
2 *Exhibit X, ECF No. 37-24, pgs. 2; 5; Eisinger Decl. at Exhibit W, ECF No. 37-23,*  
3 *pg. 1.*

4  
5 While experiencing some difficulty in his classes, R.W. was passing three of  
6 his four classes in the quarter and had received permission to turn in make-up  
7 assignments in the one credit, pass/fail class that he was not passing as of March 7,  
8 2017. *Decl. Bret Uhrich, Exhibit C, ECF No. 40-3; Cooke Dep 65:8 to 66:1.*

9  
10 On February 28, 2017, R.W. contacted his primary care physician, Dr.  
11 Michael Cabasug, because R.W. was having trouble with insomnia and was having  
12 violent thoughts regarding his instructors at CBC. *Eisinger Decl. at Exhibit L,*  
13 *ECF No. 37-12, pg. 1; Eisinger Decl. at Exhibit V, ECF No. 37-22, pg. 10.* From  
14 February 28, 2017 to March 6, 2017, R.W. attended classes at CBC with no issues  
15 and did not mention these thoughts to anyone at CBC or elsewhere. *Eisinger Decl.*  
16 *at Exhibit L, ECF No. 37-12, pg. 1; Eisinger Decl. at Exhibit H, ECF No. 37-8,*  
17 *Reagan Dep. 39:3 to 39:14; Reagan Dep. 156:7 to 156:16; Eisinger Decl. at*  
18 *Exhibit Y, ECF No. 37-25, pg. 1; Eisinger Decl. at Exhibit Z, ECF No. 37-26, pg.*  
19 *3.*

20  
21  
22 On March 6, 2017, R.W. met with Dr. Cabasug, who recommended that  
23 R.W. meet with Lourdes as the Designated Crisis Responder for Benton and  
24 Franklin Counties. *Eisinger Decl., ECF No. 37-24, pg. 5.* Araceli Perez, a social  
25

1 worker from Lourdes, met with R.W. at Dr. Cabasug's office. *Eisinger Supp.*  
2 *Decl., ECF No. 47-1, (hereafter Perez Dep. 6:4 to 7:1).* Ms. Perez is not a  
3 physician, nurse, or similar health care provider. *Id.* After meeting with R.W.,  
4 Ms. Perez requested that R.W. consider voluntarily admitting himself for  
5 evaluation. R.W. accepted the invitation and voluntarily admitted himself to  
6 Lourdes. *Perez Dep. at 49:10-50:10; R.W. Dep. at 83:23-84:18.*  
7  
8

9 At 5:55 p.m. on March 6, 2017, Ms. Perez contacted law enforcement for  
10 Franklin County to inform them of the R.W.'s comments. *Eisinger Supp. Decl. at*  
11 *Exhibit B, ECF No. 47-2, pg. 1.* According to Ms. Perez, it is Lourdes' policy to  
12 contact law enforcement when a person mentions homicidal ideations for the first  
13 time, regardless of the circumstances. *Perez Dep. 41:3 to 41:19; 50:11 to 50:19.*  
14 While this policy is illegal, *see* 45 CFR § 164.512(c)(i)(iii); 42 U.S.C. § 1320d-  
15 6(a)(3), recent Washington case law has incentivized medical providers to violate  
16 federal law to limit tort exposure. *See Volk v. DeMeerleer*, 187 Wn.2d 241, 263,  
17 386 P.3d 254, 266 (2016).  
18  
19

20 At 5:30 a.m. on the morning of March 7, 2017, R.W. met with Lourdes  
21 counselor Jia Wang after sleeping for approximately seven hours the night before.  
22 *Eisinger Supp. Decl. at Exhibit C, ECF No. 47-3, pg. 1.* By this time, R.W. was no  
23 longer reporting any homicidal ideations and was not exhibiting any aggressive  
24 behaviors. *Id.* Even after learning that afternoon that he was no longer allowed on  
25

1 campus and believed he was being dismissed from the nursing program, R.W.  
2 remained calm and did not experience any ideations. *Id. at pgs. 3-4.* On March 8,  
3 2017, R.W. contacted Ralph Reagan, the Assistant Dean for Student Conduct and  
4 Activities, asking to appeal the trespass notification that he had received the  
5 previous day. *Eisinger Supp. Decl. at Exhibit D, ECF No. 47-4, pg. 1.*

7 On March 9, 2017, R.W. requested that he be discharged from Lourdes  
8 because he had slept poorly the two previous nights. *Eisinger Supp. Decl. at*  
9 *Exhibit C, ECF No. 47-3, pg. 7.* At this time, R.W. had been evaluated by Lourdes  
10 nursing staff which had concluded that he did not present a threat of harm to  
11 others. *Eisinger Supp. Decl. at Exhibit B, ECF No. 47-2, pgs. 6-7.* However, the  
12 Transitions unit wanted R.W. to stay another night for the purpose of monitoring  
13 his sleep. *Eisinger Supp. Decl. at Exhibit C, ECF No. 47-3, pg. 9.* R.W. agreed  
14 and was evaluated again on March 10, 2017 as part of his discharge, which once  
15 again concluded that R.W. was not a threat to others and did not meet even the  
16 base criteria for initial detention. *Eisinger Supp. Decl. at Exhibit B, ECF No. 47-2,*  
17 *pg. 8-9; Eisinger Supp. Decl. at Exhibit C, ECF No. 47-3, pg. 12.* The criteria for  
18 initial detention requires only probable cause that a person presents a likelihood of  
19 serious harm to others. RCW 71.05.150(1);(2)(a)(i).

1                   **What Information CBC Knew Regarding R.W. And When It Knew It.**

2                   On March 7, 2017, Reagan issued a letter trespassing R.W. from CBC  
3 because R.W. engaged in “Abusive Conduct.” *Eisinger Decl.at Exhibit I, ECF No.*  
4 *37-9, pg. 1.* “Abusive Conduct” is defined in WAC § 132S-100-205 as follows:

6                   Abusive conduct. Physical and/or verbal abuse, threats, intimidation,  
7 harassment, online harassment, coercion, bullying, cyberbullying,  
8 retaliation, stalking, cyberstalking, and/or other conduct which  
9 threatens or endangers the health or safety of any person or which has  
the purpose or effect of creating a hostile or intimidating environment.

10 *Id*; WAC § 132S-100-205. According to Reagan, the only information he had at  
11 the time he issued the trespass was an e-mail forwarded by CBC’s security advisor,  
12 Levi Glatt, and a phone call from Glatt telling Reagan to expel R.W. from school.  
13 *Eisinger Decl., ECF No. 37-10, pgs. 9-12; Reagan Dep., ECF No. 37-8, 23:20 to*  
14 *24:12.* The e-mail forwarded from Glatt stated as follows:

16                   Levi,  
17 At approximately 0800 hours 3/7/17, I was contacted by Ofc. K.  
18 Erickson of PPD with the following information.  
19 PPD was contacted earlier today by Crisis Response about CBC  
20 student [R.W.]. [R.W.] admitted to having homicidal ideations  
21 toward staff at CBC, talking about lighting offices on fire and  
attacking people with saws. The instructors specifically mentioned  
are Kim [T]ucker Valerie Topham and Alma Martinez.

22                   [R.W.] is currently at Carondelet getting help and may not be an  
23 immediate threat.

24 *Id.* Reagan apparently (and incorrectly) believed that Lourdes had made an  
25 evaluation of the seriousness of these ideations in contacting law enforcement.



1 *Eisinger Supp. Decl. at Exhibit F, ECF No. 47-6, (hereafter Reagan Dep.) 30:12 to*  
2 *31:2; Perez Dep. 41:3 to 41:19; 50:11 to 50:19.*

3  
4 After March 7, 2017, Reagan began accumulating additional information  
5 showing that R.W. was not a threat to others. On March 10, 2017, R.W. provided a  
6 further statement to Reagan describing the situation:

7  
8 **From:** R W < >  
**Sent:** Friday, March 10, 2017 3:17 PM  
**To:** Reagan, Ralph  
**Subject:** Re: Student Appeals Board

9  
10 Mr. Reagan,

11 I apologize for the delay, I was in a form of treatment where access to the internet was unavailable for a certain  
12 period of time.

13 You were originally notified of my condition, but only to the extent required by law. I would like to plead my  
14 case by filling in the blanks.

15 I originally had some violent thoughts over a week ago, but never acted on them, instead I sought out treatment.  
16 After speaking with my primary care physician last Monday, I met with a crisis advisor, and spent every day  
17 since then in treatment at Lourdes. I was released today after it was determined by the staff at Lourdes and the  
18 crisis advisor that I was not a threat to myself or others. I have begun a medical regimen, including medication  
19 and outpatient counseling. The nurse practitioner at Lourdes that cared for me has offered to advocate on my  
20 behalf, and so has my Primary Care Physician. Please let me know if any documentation would help my case,  
21 and I will attempt to get it Monday for you.

22 I would very much like the opportunity to complete my degree with the nursing program, especially since I am  
23 close to finishing. I have developed new coping strategies to help with the stress I experienced, and I also have  
24 developed a care plan with the team of medical professionals in the unfortunate case that these feelings are ever  
25 to arise again.

Thank you very much,  
R W

19 Reagan learned that the information set forth in R.W.'s letter was true during the  
20 course of his investigation. *Reagan Dep. 39:3 to 42:5.* More importantly, Reagan  
21 did not have any evidence contrary to these statements which would establish that  
22 R.W. was a threat of harm to others. *Id; Reagan Dep., ECF No. 37-8, 175:15 to*  
23 *175:19.*



1 On March 22, 2017, Reagan met with R.W. and requested that R.W. grant  
2 Reagan access to his medical records from Lourdes and Dr. Cabasug and allow  
3 Reagan to speak with the providers. *Eisinger Supp. Decl at Exhibit G., ECF No.*  
4 *47-7, pg. 2.* R.W. provided his medical records from Dr. Cabasug on April 4, 2017  
5 and the Lourdes documents on April 14, 2017. *Id. at pgs. 2-3.* This was the first  
6 time anyone from CBC was able to review the documents from Lourdes. *Id;*  
7  
8 *Reagan Dep., ECF No. 35-4, 62:24-63:14.*  
9

### 10 **Finding of Misconduct and Imposition of Sanctions.**

11 On April 19, 2017, CBC affirmed its interim decision to trespass R.W. from  
12 campus for Abusive Conduct with the modification that R.W. would be allowed on  
13 the Pasco campus, but not on the Richland campus where the nursing program  
14 classes take place. *Eisinger Decl. at Exhibit N, ECF No. 37-15, pg. 1; Reagan*  
15 *Dep., ECF No. 37-8, 59:11 to 59:15.* On April 20, 2017, CBC found R.W.  
16 responsible for engaging in “Abusive Conduct” in violation of the Student Code of  
17 Conduct. *Eisinger Decl. at Exhibit P, ECF No. 37-16, pgs. 1-2.*  
18  
19  
20  
21  
22  
23  
24  
25

1 Thank you for meeting with me on March 22nd, 2017 to discuss your alleged violations of the  
2 policies outlined in Columbia Basin College's (CBC) *Student Code of Conduct*. After meeting with  
3 you, I have found you responsible for violating our policy on Abusive Conduct (WAC 132S-100-  
4 205).

5 **WAC 132S-100-205 Abusive conduct.**

6 Physical and/or verbal abuse, threats, intimidation, harassment, online harassment,  
7 coercion, bullying, cyberbullying, retaliation, stalking, cyberstalking, and/or other  
8 conduct which threatens or endangers the health or safety of any person or which has  
9 the purpose or effect of creating a hostile or intimidating environment.

10 As per our conversation at the meeting, you explained that you had homicidal thoughts due to  
11 stress and lack of sleep with the possibility of medication being a factor. When you had  
12 homicidal thoughts you immediately contacted your primary care doctor because you were  
13 concerned. Your doctor recommended that you go to Crisis Response and you were voluntarily  
14 admitted to Lourdes. I understand that the result of your behavior was not to create a hostile or  
15 intimidating environment, but it had the same effect. Therefore you are found responsible for  
16 violating our policy on Abusive Conduct. I reviewed the materials you provided and after my  
17 investigation and thoughtful consideration of everything that occurred, the sanctions are as  
18 follows:

19 *Id.* Based on the finding of misconduct, CBC imposed sanctions against R.W.,  
20 including the continuing imposition of his trespass, conditioning his future re-  
21 enrollment at the discretion of CBC, and granting CBC continuing access to his  
22 medical records. *Id.* As a result of the sanctions and trespass, R.W. was  
23 disenrolled from CBC. *Eisinger Decl. at Exhibit F, ECF No. 37-6, pg. 1.* R.W.'s  
24 financial aid was cancelled, and he was rendered ineligible to obtain further  
25 financial aid until he completed an additional quarter. *Eisinger Decl. at Exhibit B,*  
*ECF No. 37-2, pgs. 1-2.* Additionally, the disenrollment permanently rendered  
R.W. ineligible to rejoin the nursing program at CBC absent special dispensation  
from the University's President. *Decl. Mary Hoerner, ECF No. 34, pg. 2.*

When asked to describe how R.W.'s disclosure of violent thoughts to his  
physician constituted Abusive Conduct, Reagan identified the following:

1 Abusive conduct. Physical and/or verbal abuse, threats, intimidation,  
2 harassment, online harassment, coercion, bullying, cyberbullying,  
3 retaliation, stalking, cyberstalking, and/or other conduct which  
4 threatens or endangers the health or safety of any person or which has  
the purpose or effect of creating a hostile or intimidating environment.

5 *Eisinger Supp. Decl. at Exhibit H, ECF No. 47-8; Reagan Dep. 152:15 to 152:20.*

6 According to Reagan, the “conduct” at issue were the thoughts in R.W.’s head.

7 *Reagan Dep. 153:25 to 154:10.* Both Reagan and President Lee Thornton

8 affirmed that R.W. was not a direct threat to the health and safety of others at the

9 time the sanctions were issued. *Reagan Dep., ECF No. 37-8, 175:15 to 175:21;*

10 *Eisinger Supp. Decl. at Exhibit I, ECF No. 47-9 (hereafter Thornton Dep.) 40:17*

11 *to 41:19; 42:3 to 42:15.*

## 12 13 14 I. ARGUMENT

15 The Court should deny the Defendants’ motion for summary judgment and  
16 grant R.W.’s motion for partial summary judgment. In seeking summary judgment  
17 in this matter, the Defendants simply cannot face the fact that they punished a  
18 disabled student for his private conversation with his physician in seeking medical  
19 treatment. It is difficult to see how the Defendants can reconcile their position  
20 with the expansive case law preventing colleges from attempting to punish students  
21 for speech protected by the First Amendment. It is also difficult to determine how  
22 CBC could even subjectively believe R.W. posed a direct threat to the student body  
23 when both the decision makers at CBC, together with R.W.’s medical providers,  
24  
25

1 concluded that R.W. does not pose a threat of harm to others. As a result, the  
2 Court should deny Defendants' motion for summary judgment and grant R.W.'s  
3 motion for summary judgment.  
4

5 **A. *Tinker's* "Substantial Disruption" Test Does Not Apply To**  
6 **Colleges.**

7 The Court should deny the Defendants' motion for summary judgment  
8 because the undisputed facts show that Reagan and Thornton violated R.W.'s  
9 rights in violation of 42 U.S.C. § 1983. In moving for summary judgment in this  
10 matter, the Defendants assert that *Tinker v. Des Moines County School District* is  
11 the controlling framework for CBC's decision to sanction R.W. for "Abusive  
12 Conduct." 393 U.S. 503, 506 (1969). In doing so, the Defendants ignore the  
13 repeated refusal of the Ninth Circuit and the Supreme Court itself to extend the  
14 "Student Speech Doctrine" to the university setting. *Oyama v. Univ. of Hawaii*,  
15 813 F.3d 850, 863 (9th Cir. 2015); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S.  
16 260, 273 n. 7 (1988). This reluctance is unsurprising considering that *Tinker* was  
17 decided in 1969 and a mere three years later in *Healy v. James*, the Court stated  
18 "the precedents of [the Supreme Court] leave no room for the view that, because of  
19 the acknowledged need for order, First Amendment protections should apply with  
20 less force on college campuses than in the community at large." *Healy*, 408 U.S. at  
21 180.  
22  
23  
24  
25

1       The first attempt to extend *Tinker* to the university setting was *Brown v. Li*,  
2 308 F.3d 939, 941 (9th Cir. 2002). In *Brown*, student Christopher Brown  
3 presented a master's thesis, *The Morphology of Calcium Carbonate: Factors*  
4 *Affecting Crystal Shape*, which was approved by the thesis committee. *Id.* at 943.  
5 After approval, Brown added a "disacknowledgements" section in which he  
6 offered a "special [expletive] you to the following degenerates for being an ever-  
7 present hindrance during my graduate career," listing several school officials. *Id.*  
8 Brown then attempted to file the thesis with the library as a prerequisite to earning  
9 his degree. *Id.* Brown refused to remove the disacknowledgements section and  
10 instead brought an action under 42 U.S.C. § 1983 for violation of his First  
11 Amendment Rights and Due Process Rights. *Id.* at 946.

12       On appeal, the Ninth Circuit affirmed the dismissal of Brown's claims.  
13 While Judge Susan Graber concluded that curricular speech in a university is  
14 subject to the student speech doctrine, none of the other panel members agreed  
15 with this approach. *Id.* at 949; 955. Judge Warren Ferguson concurred in  
16 judgment, rejecting Judge Graber's approach and concluded that the university's  
17 conduct was appropriate in light of Brown's attempt to deceive the university by  
18 appending the "disacknowledgements" section after he received approval, which  
19 did not implicate the First Amendment. *Id.* at 955 (J. Ferguson, concurring).  
20 Judge Stephen Reinhardt issued a decision concurring in part and dissenting in part  
21  
22  
23  
24  
25

1 due to the “erroneous legal rule advocated by one of my colleagues.” *Id.* at 956 (J.  
2 Reinhardt, concurring in part and dissenting in part). Judge Reinhardt was  
3 particularly concerned that applying the student speech doctrine “would import  
4 into the college and graduate academic world the limitations on speech that the  
5 Supreme Court has held appropriate for use in the case of emotionally less mature  
6 high school students.” *Id.* at 957.  
7

8  
9 The application of *Tinker* and the Student Speech Doctrine was recently  
10 revisited in *Oyama v. University of Hawaii*, and the Court once again declined to  
11 apply the doctrine in the university setting. 813 F.3d 850, 861 (9th Cir. 2015). In  
12 *Oyama*, student Mark Oyama was pursuing his post-degree teaching certification  
13 through the University of Hawaii. *Id.* at 855. As part of the certification program,  
14 Oyama met with his instructor after he submitted a strange response to an  
15 assignment in regard to online child predation and said it would be fine for a 12  
16 year old student to have a consensual relationship with a teacher. *Id.* at 856.  
17 Oyama further indicated that he did not believe teachers should be required to  
18 teach students on a wide-range of performance, particularly disabled students who  
19 might require accommodations. *Id.* at 857. The University denied Oyama’s  
20 application to be placed as a student teacher citing, among other things, Oyama’s  
21 understanding of sexual relationships between adults and minors, as well as  
22 between teachers and students, as contrary to the “legal and ethical guidelines  
23  
24  
25

1 imposed by the State.” *Id.* at 858. After the internal appeals were concluded,  
2 Oyama brought suit alleging violations of his rights under 42 U.S.C. § 1983. *Id.* at  
3 859.  
4

5 On appeal, the Court began by reviewing the First Amendment claim to  
6 determine if the Student Speech Doctrine was applicable. *Id.* at 861. The Court  
7 reviewed the evolution from *Tinker* to *Hazelwood* and *Morse v. Frederick*, 551  
8 U.S. 393 (2007). However, after reviewing the cases, the Court noted that “[w]hile  
9 aspects of Student Speech Doctrine are relevant here, the Supreme Court has yet to  
10 extend this doctrine to the public university setting.” *Id.* at 862 (citing *Hazelwood*,  
11 484 U.S. at 273). “In the twenty-seven years since *Hazelwood*, we too have  
12 declined to apply its deferential standard in the university setting.” *Oyama*, 813  
13 F.3d at 862. The Court recognized that the rationales for limiting speech in  
14 secondary education are simply inapplicable to universities where the students are  
15 adults. *Id.* at 863. As a result, the Court declined to apply the Student Speech  
16 Doctrine to Oyama’s claims. *Id.* at 864.  
17  
18  
19

20 In light of the *Healy*’s command that there are no special exceptions to the  
21 First Amendment for colleges and universities, it is easy to understand why the  
22 Ninth Circuit has refused to apply the “substantial disruption” test to the college  
23 campus, especially outside of the classroom. Indeed, *Healy* itself was a case where  
24 the university wished to bar the Students for a Democratic Society because the  
25



1 university feared it would be a “disruptive force on campus.” *Healy*, 408 U.S. at  
2 191. Without a special exception to the First Amendment, CBC would have to  
3 justify its conduct under the traditional limits to speech: defamation, fighting  
4 words, true threats, etc. There is no serious dispute that R.W. seeking medical  
5 advice and treatment from his physician does not fall into any of these exceptions.  
6 As a result, the Court should deny the Defendants’ motion for summary judgment.  
7

8  
9 **B. Even If The Court Were To Conclude The Tinker**  
10 **“Substantial Disruption” Test Applies, CBC, Reagan And**  
11 **Thornton Still Violated R.W.’s Rights Under The First**  
12 **Amendment.**

13 Even if the Court concludes that *Tinker* applies, R.W. is still entitled to  
14 summary judgment because CBC violated his rights by concluding his “conduct”  
15 of disclosing violent thoughts to his doctor was “abusive” and sanctionable. In  
16 support of its position, CBC relies primarily on *McNeil v. Sherwood School*  
17 *District* and *Wynar v. Douglas County School District*. In *McNeil*<sup>1</sup>, a minor

18  
19 <sup>1</sup> Additionally, the Court’s decision in *McNeil* post-dates the conduct of CBC in  
20 this case. The Defendants cannot rely on *McNeil* as basis for creating ambiguity  
21 on whether the rights of R.W. were clearly established in March and April of 2017.  
22 See *Bryan v. United States*, 913 F.3d 356, 363 (3d Cir. 2019) (decision made two  
23 days prior to conduct did not put officers on notice of the unlawfulness of their  
24 actions).  
25

1 student's mother found a "hit list" surreptitiously in her son's personal journal.  
2 918 F.3d 700, 703 (9th Cir. 2019). The journal contained other indications that the  
3 child was experiencing serious mental health issues, such as writing "I am God"  
4 and illustrating graphic depictions of violence. *Id.* at 704. The student's mother  
5 brought the journal to her therapist who informed the police. *Id.* The police then  
6 went to the home and confiscated the minor's rifle and ammunition and informed  
7 the school. *Id.* The school told the other parents in the school which set off a  
8 wave of panic, with parents removing their children from the school. *Id.* at 705.  
9 The student did not undergo any medical or psychological evaluation to determine  
10 if he was a threat of harm to others. *Id.* The school expelled the student following  
11 his initial suspension. *Id.* at 706.

12  
13  
14  
15 In determining whether the student could be punished for this speech, the  
16 Court adopted a three-part test based on the totality of the circumstances:

17  
18 We now clarify that courts considering whether a school district may  
19 constitutionally regulate off-campus speech must determine, based on  
20 the totality of the circumstances, whether the speech bears a sufficient  
21 nexus to the school. This test is flexible and fact-specific, but the  
22 relevant considerations will include (1) the degree and likelihood of  
23 harm to the school caused or augured by the speech, (2) whether it  
24 was reasonably foreseeable that the speech would reach and impact  
25 the school, and (3) the relation between the content and context of the  
speech and the school...

*Id.* at 707-08 (internal citations omitted). In applying the test, the court concluded  
that the "hit list," in light of the other information contained therein along with the

1 student's access to guns and lack of evaluation from medical professionals, created  
2 a plausible likelihood of harm. *Id.* at 709. Next, because of an Oregon statute  
3 requiring parental notifications of such events, there was strong likelihood the  
4 speech would impact the school and result in substantial disruptions in-fact. *Id.*  
5 Finally, the Court concluded that the speech had a significant nexus to the school.  
6

7 As applied to the case at hand, *McNeil* is wholly inapposite in the present  
8 matter. First and foremost, CBC did not purport to expel R.W. on the basis that he  
9 presented a likelihood of disruption to campus. *Eisinger Decl. at Exhibit P, ECF*  
10 *No. 37-16, pgs. 1-2.* CBC found R.W. responsible for committing "Abusive  
11 Conduct" which had the effect of creating a hostile environment. *Id.* However,  
12 R.W. did not engage in anything that could be considered conduct, let alone  
13 conduct that was harassing to the staff or other students at CBC. *Reagan Dep.*  
14 *153:25 to 154:10.* The sole action at issue was R.W. disclosing violent thoughts to  
15 his doctor and his doctor alone. There is no evidence that this was likely to be  
16 transmitted to CBC. Indeed, the policy of Lourdes which led to the disclosure is  
17 unlawful. *See 45 CFR § 164.512(c)(i)(iii).*  
18  
19  
20

21 Further, there was no basis for CBC to conclude that R.W. posed a threat of  
22 harm to the school at any time. By the time CBC became aware of the R.W.'s  
23 conversation with Dr. Cabasug, they knew he was in treatment and "may not be an  
24 immediate threat." *Eisinger Decl., ECF No. 37-10, pgs. 9-12; Reagan Dep., ECF*  
25

1 No. 37-8, 23:20 to 24:12. More importantly, CBC never uncovered any evidence  
2 to establish that R.W. was a direct threat, and the decision makers at CBC  
3 belatedly came to this same conclusion. *Reagan Dep. 39:3 to 42:5; 175:15 to*  
4 *175:19; Thornton Dep. 40:17 to 41:19; 42:3 to 42:15.* Yet, those same decision  
5 makers chose to sanction R.W. regardless. *Eisinger Decl. at Exhibit P, ECF No.*  
6 *37-16, pgs. 1-2; Eisinger Decl. at Exhibit T, ECF No. 37-20, pgs. 1-4.* The only  
7 thing CBC had to support its conduct was the unfounded fears and overreaction of  
8 the college's administrators. This is not a basis for violating R.W.'s First  
9 Amendment rights. As a result, the Court should deny the Defendants' motion for  
10 summary judgment and conclude that CBC, Reagan and Thornton violated R.W.'s  
11 rights under the First Amendment.  
12  
13  
14

15 **C. Defendants Are Not Entitled To Qualified Immunity.**

16 The Court should further conclude that the rights of R.W. were clearly  
17 established at the time CBC sanctioned him for the "Abusive Conduct" of  
18 disclosing violent thoughts to his physician. Nothing mandates that district courts  
19 construe the constitutional right before them as narrowly as possible, as the  
20 Defendants invite the Court to do here. "It is not necessary, of course, that 'the  
21 action in question has previously been held unlawful.'" *Ziglar v. Abassi*, 137 S.  
22 Ct. 1843, 1867 (2017) (*quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987));  
23  
24  
25

1 *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (“officials can still be on notice  
2 that their conduct violates established law even in novel factual circumstances.”).

3  
4 Qualified immunity analysis involves more than “a scavenger hunt for  
5 prior cases with precisely the same facts. The more obviously  
6 egregious the conduct in light of prevailing constitutional principles,  
7 the less specificity is required from prior case law to clearly establish  
8 the violation.”

9 *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016) (internal citations omitted)  
10 (*quoting Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007))  
11 accord *Sharp v. Cty. of Orange*, 871 F.3d 901, 911 (9th Cir. 2017)).

12 In this case, the Defendants are on clear notice that their conduct was illegal,  
13 regardless of whether the Court concludes that the *Tinker* substantial disruption test  
14 applies. First, if the Court looks at what CBC actually did: applied a Student Code  
15 of Conduct to student speech by attempting to characterize the speech as abusive,  
16 the decisions finding such actions unconstitutional are legion. *See McCauley v.*  
17 *Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d  
18 301 (3d Cir. 2008); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995);  
19 *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Coll.*  
20 *Republicans at S.F. St. Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007);  
21 *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg*  
22 *Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *UWM Post, Inc. v. Bd. of Regents of*  
23 *the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. Univ. of Mich.*, 721

1 F. Supp. 852 (E.D. Mich. 1989). There is a reason that the Defendants seek to  
2 avoid the proper framing of their conduct in this matter -- there is simply no case  
3 law that they could point to which supports their position.  
4

5 Second, even if the Court concluded that *Tinker* and the Student Speech  
6 Doctrine was applicable, *LaVine v. Blaine School District*, 257 F.3d 981, 983-84  
7 (9th Cir. 2001) put the Defendants on notice that R.W. had a clearly established  
8 right under the First Amendment not to be subject to adverse actions, let alone  
9 actual punishment, unless CBC had substantially more information indicating that  
10 R.W. posed a direct threat to campus. Moreover, the admissions of Reagan and  
11 Thornton give lie to the substantial disruption argument. Both Reagan and  
12 Thornton admitted that they subjectively did not believe R.W. constituted a direct  
13 threat to the students or teachers and yet they proceeded to sanction him regardless.  
14 *Reagan Dep. 175:15 to 175:19; Thornton Dep. 40:17 to 41:19; 42:3 to 42:15.*  
15 What CBC could have done, had it reasonably concluded a student posed a threat,  
16 is wholly irrelevant when dealing with the Defendants here who concluded R.W.  
17 did not pose a threat but decided to punish him anyway. In light of the clearly  
18 established case law, the Court should conclude as a matter of law that the  
19 Defendants are not entitled to qualified immunity.  
20  
21  
22  
23  
24  
25

1           **D.    R.W. Is Entitled To Prospective Injunctive Relief Against**  
2           **The Defendants Removing The Restrictions Imposed**  
3           **Against Him In Violation Of The First Amendment.**

4           The Court should further deny the Defendants’ motion for summary  
5 judgment because R.W. is entitled to injunctive relief based on the Defendants’  
6 violation of his First Amendment rights. Claims under § 1983 are limited by the  
7 scope of the Eleventh Amendment. In *Will v. Michigan Dep’t of State Police*, the  
8 Supreme Court held that “States or governmental entities that are considered ‘arms  
9 of the State’ for Eleventh Amendment purposes” are not “persons” under § 1983.  
10 *Will*, 491 U.S. 58 (1989). Moreover, *Will* clarified that a suit against a state  
11 official in his official capacity is no different from a suit against the State itself. *Id.*  
12 at 71. Therefore, state officials sued in their official capacities are not “persons”  
13 within the meaning of § 1983. However, there is one exception to this general  
14 rule: When sued for prospective injunctive relief, a state official in his official  
15 capacity is considered a “person” for § 1983 purposes. *Id.* at 71 n. 10. In what has  
16 become known as part of the *Ex parte Young* doctrine, see *Ex parte Young*, 209  
17 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), a suit for prospective injunctive relief  
18 provides a narrow, but well-established, exception to Eleventh Amendment  
19 immunity. *Doe v. Lawrence Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th Cir.  
20 1997).



1 As discussed *supra*, CBC, Reagan and Thornton violated R.W.'s First  
2 Amendment rights by sanctioning R.W. for speech directed to his treating  
3 physician in the context of seeking treatment. R.W. has and continues to suffer  
4 from the sanctions imposed by the Defendants: trespass from campus, *Eisinger*  
5 *Decl. at Exhibit P, ECF No. 37-16, pgs. 1-2*; 0.00 GPA for 12 credits in the Winter  
6 2017 Quarter which prevents him from procuring financial aid, *Eisinger Decl. at*  
7 *Exhibit D, ECF No. 37-4, pg. 4 and Eisinger Decl. at Exhibit B, ECF No. 37-2,*  
8 *pgs. 1-2*; permanent ineligibility for re-entry into the nursing program without  
9 special dispensation from CBC's president, *Decl. Mary Hoerner, ECF No. 34, pg.*  
10 *2*; and required disclosure and access to his medical providers as a condition of  
11 future re-enrollment at the school in any fashion. *Eisinger Decl. at Exhibit P, ECF*  
12 *No. 37-16, pgs. 1-2*. As each of these sanctions remain ongoing and are limited to  
13 prospective injunctive relief, the Court should deny the Defendants' motion for  
14 summary judgment.  
15  
16  
17  
18

19 **E. The Court Should Deny Defendants' Motion For Summary**  
20 **Judgment On The ADA, RHA And WLAD Claims Because**  
21 **There Was No Objective Medical Evidence R.W. Posed A**  
22 **Direct Threat And The Defendants Agreed Subjectively**  
23 **That R.W. Did Not Pose A Direct Threat.**

24 The Court should deny the motion for summary judgment because the  
25 evidence establishes that the Defendants violated R.W.'s rights under the ADA,  
RHA and WLAD. As set forth in R.W.'s motion for partial summary judgment

1 and as is effectively acknowledged in the Defendants’ motion, there is no serious  
2 dispute that the Defendants have treated R.W. differently based on his disability.  
3 Other students are not trespassed from campus. Other students are not required to  
4 grant the school access to their medical records. Other students are allowed to  
5 complete their course assignments. The decision makers attributed R.W.’s actions  
6 to his disability. *Reagan Dep. 175:5 to 175:14*. Taking an action against a  
7 disabled person for symptoms of their disabilities is the same as taking action  
8 against them based on their disabilities. *See Humphrey v. Memorial Hospitals*  
9 *Ass’n*, 239 F.3d 1128, 1139–40 (9th Cir. 2001); *see also Gambini v. Total Renal*  
10 *Care, Inc.*, 486 F.3d 1087, 1093 (9th Cir. 2007)

14 The only possible defense available to CBC is to argue that R.W. constituted  
15 (and as the sanctions are ongoing, continues to constitute) a direct threat to the  
16 school. 28 C.F.R. § 35.139(b). The “belief that a significant risk existed, even if  
17 maintained in good faith, does not relieve [a defendant] of liability.” *Bragdon v.*  
18 *Abbott*, 524 U.S. 624, 649 (1998). In this matter, there is no medical or otherwise  
19 objective evidence which would allow CBC to have concluded on April 20, 2017  
20 that R.W. posed or continues to pose a direct threat. R.W. had been evaluated by  
21 Lourdes and his treating physician as not constituting a threat of harm to others.  
22 Not only has CBC failed to present any evidence that R.W. constitutes a direct  
23 threat, even Reagan and Thornton, as the decision makers for CBC, acknowledged  
24  
25

1 that they subjectively believed he was not a direct threat. Without the safe harbor  
2 of the direct threat exception, CBC's liability under the ADA, RHA and WLAD is  
3 conclusively established. As a result, the Court should deny the Defendants'  
4 motion for summary judgment and grant R.W.'s motion for summary judgment.  
5

## 6 II. CONCLUSION

7 The Court should deny the Defendants' motion for summary judgment and  
8 grant R.W.'s motion for partial summary judgment. There is no better illustration  
9 of the appropriateness of this outcome than the Defendants' refusal to address or  
10 defend the actual conduct by CBC, Reagan and Thornton. Summary judgment is  
11 appropriate when the facts are taken in the light most favorable to the non-moving  
12 party. Instead, the Defendants seek to avoid the undisputed fact that CBC  
13 sanctioned R.W. for what it identified as the "Abusive Conduct" of R.W. seeking  
14 help from medical professionals. If the Defendants were confident in the legality  
15 of those actions, they would proudly display these actions and would not feel the  
16 need to rely on a post-hoc justifications divorced from the facts and the actual  
17 findings made by CBC and discipline imposed by CBC on R.W. CBC is not  
18 willing to do so because the undisputed facts conclusively establish that CBC  
19 violated R.W.'s rights under the First Amendment and discriminated against him  
20 as a disabled individual. As a result, the Court should deny the Defendants'  
21  
22  
23  
24  
25

1 motion for summary judgment and grant R.W.'s motion for partial summary  
2 judgment establishing liability.  
3  
4

5 DATED this 24<sup>th</sup> day of June, 2019.  
6

7 *s/Bret Uhrich*

8 Eric B. Eisinger, WSBA #34293

9 Bret Uhrich, WSBA #45595

10 Attorneys for Plaintiffs

11 Walker Heye Meehan & Eisinger, PLLC

12 1333 Columbia Park Trail, Ste 220

13 Richland, WA 99352

14 Telephone: (509) 735-4444

15 Fax: (509) 735-7140

16 E-mail: [eeisinger@walkerhey.com](mailto:eeisinger@walkerhey.com)

17 [buhrich@walkerhey.com](mailto:buhrich@walkerhey.com)  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF SERVICE

I hereby certify that on this 24<sup>th</sup> day of June 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Carl P. Warring: [carlw@atg.wa.gov](mailto:carlw@atg.wa.gov)

*s/ Bret Uhrich*

\_\_\_\_\_  
Bret Uhrich